Glaxo Smithkline Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-06-2005

Reported in : (2005)(188)ELT171Tri(Mum.)bai

Judge : S T S.S., T Anjaneyulu

Appellant : Glaxo Smithkline

Respondent : C.C.E.

Judgement :

1. We find some typographical errors as a result of which the Order No.A-668/WZB/2004-CII, dated 20-8-2004 & Corrigendum No. M-514/WZB/05-CII, dated 9-12-2004 of this Tribunal does not make very clear reading and its meaning somewhat unclear. Therefore, we have considered it appropriate to correct the text of the order, now as reproduced below.

"1. M/s. Glaxo SmithKline Pharmaceuticals Ltd. formerly known as M/s. Glaxo India Ltd., a company registered is an appellant in this case. They are engaged in the manufacturing & sale of drugs, pharmaceuticals, fine chemical diagnostic & animal teed supplements.

They along with M/s. Burrough Wellcome India Ltd. another company hereinafter referred to as BWIL for short are independent subsidiary of Glaxo Wellcome Pvt. Ltd. (now known as Glaxo SmithKline Service Pvt. Ltd.) UK, pending a formal merger of BWIL & appellants, to be carried out fully. BWIL is also engaged in the manufacture & sale of wide range of drugs & pharmaceutical products. The joint operation costs incurred by the appellant for BWIL are allocated & reimbursed as per an agreement.

2. Pursuant to verification of Notes of accounts [Section 18(12)(b)] of the Balance Sheet for 1998 & 1999 it was found, by the officers, that the appellant has recovered certain amounts towards 'Staff Costs' & other expenses & shared services from BWIL. This was considered to, after due enquiries, "Management Consulting Services" provided by the appellants to BWIL as per definition in Section 65(37) of Chapter V of Finance Act, 1994 (as amended) for Management Consultant, & definition of Taxable Service in Section 65(72) of Chapter V of Finance Act, 1994 & interpretation of the term 'Service Provider', The appellants were charged & held liable to a Service Tax of Rs. 1,12,97,893/- on amount of Rs. 22,59,57,866/- so recovered from BWIL during the period 16-10-98 to 31-12-2000 as follows - Rs. 1,92,84,849/- as Management cost (staff cost) for the period 16-10-98 to 31-12-98 Rs. 1,92,90,017/- as Management cost (other expenses) for the period 16-10-98 to 31-12-98 Rs. 8,88,10,000/- as Management cost (staff cost) for the period 1-1-2000 to 31-12-2000 Rs. 9,85,73,000/- as Management cost (other expenses) for the period 1-1-2000 to 31-12-2000.

Besides the Service Tax held recoverable, as worked out to Rs. 1,12,97,893/- at 5% on the total of above recoveries, the appellants were held liable to a penalty of Rs. 500/- under Section 75A of the said Act for failure to get themselves registered under Service Tax as per Section 69. A penalty of Rs. 100/-per day for delay in payment of the said tax as per Section 76, a penalty of Rs. 1,000/- under Section 77 for non-filling of ST-3 return along with interest @ 24% to be paid for delay as per Section 75 of that Act. The Commissioner (Appeals) confirmed the order of the lower authority. Hence this appeal.

3. After hearing both sides and considering the material submissions it is found - (a) The plea of the appellant of being in the business of manufacture & sale of drugs/pharmaceuticals & carrying out of certain day-to-day activities for BWIL, a group company and not a client, without receipt of fee or professional charges for the same & being compensated in actuals will not render them "Management

consultant" would ipso facto is not exempt them from the visit of Service Tax, is not accepted following Kerala Colour Labs Association relied upon by the ld. DR. It is the rendering of service that is taxed & not belonging to a profession, trade or calling. The taxable event would arise if the 'Service is rendered'. The considerations to defer the "Service rendered' import full or at profit is not relevant as taxable event will determine the Tax & not the compensation thereof, (see also Parasmal Bam [2002 (146) E.L.T. 717].

(b) Examining the costs deferred by BWIL it is found that 'other expenses' are on account of following factors for the period 1-1-1998 to 31-12-98 as per letter dated 25-2-99 of the CA) -Other Expenses Rs. In lakhsPublicity 164.29 None of the headings, as per the above certifications, would cover the definition of "Management Consultancy Service" rendered costs.

Therefore the levy of Service Tax on these costs cannot be upheld as arrived in the impugned order. Service Tax is in any case not payable on reimbursuant/out of pocket expenses charged on actuals as per the clarifications & Trade Notices of the department.

(c) The staff costs as per the CA certifications are the costs incurred of 8 marketing team which had been allocated to BWIL, based on budgeted turnover for each team. Further, cost of the staff members in Glaxo payroll, working involving exclusively for BWIL, had not been directly cross charged. The gratuity & leave encashment benefit pertaining to the field force staff working for BWIL had not been cross charged. However these amounts were not expected to be material. These charges therefore are executory costs and not advisory costs for marketing the products of BWIL. CBEC vide circular dated 27-7-2001 has clarified that the intention is to Tax the Advisory Services provided by the consultants, and not the Executory Services provided by a contractor. The staff costs as incurred & reimbursed for 8 teams in marketing exclusively for BWIL, as ably presented by the ld. DR, would be conducting Executory Functions & not Advisory Functions. The definition of Management Consultant reads as under - "(65) "management consultant" means any person who is engaged in providing any service, either directly or indirectly in connection with the management of any organisation in any manner and includes any person who renders any advise, consultancy or technical assistance, relating to conceptualising, devising, development, modification, rectification or upgradation of any working system of any organisation".

When read with the subsequent coverage of Service Tax levy on "business auxiliary service" which was introduced & defined as in (July 2003) "(19) "business auxiliary service" means any service in relation to, - (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or (iii) any customers care service provided on behalf of the client; or (iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customs & public relation services, as a Commission agent, but does not include any information technology service." Would support the acceptance of the plea made by the ld. Advocate that the nature of the Executory Services provided by the Marketing Team Staff would more appropriately fall under 'business auxiliary service" & not "Management Consultancy service" as the definition of Management Consultancy Service remains the same even after the levy of inclusion & of Service Tax on "business auxiliary service" in the year 2003. When an existing Tariff definition remains the same, then the introduction of new Tariff entry would imply that the coverage under the new Tariff for purpose of Tax is an area not covered by the earlier entry. The new entry is extension of the scope of coverage if Service Tax and not carving out of a new entry, from the erstwhile entry of "Management Consultancy Service". Therefore, it has to be held, that in the facts of this case, the levy of Service Tax on Staff Costs defined by BWIL, under the heading 'Management Consultancy Service' cannot be upheld. Levy on such costs could be as on business auxiliary service, which was not a Taxable Service prior to 2003 & appellant is not a service provider as Management Consultant.

(d) Once that is found, & the appellant cannot be classified as a service provider under 'Management Consultant' levy of Service Tax cannot visit prior to 2003 or after 2003 under and a 'Management Consultant'.

(e) When there is no levy of Service Tax on the appellant, for the Services provided, there was no requirement of registration & filing of returns &/or delay payment of any tax during the period under dispute. The penalties imposed are to be set aside along with the demand of tax as made and interest consequent thereon.